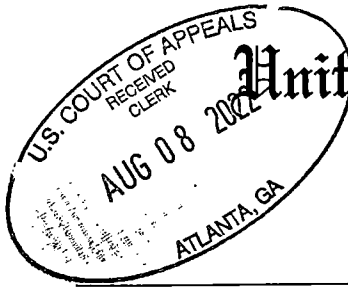


No. 21-11287



**United States Court of Appeals
for the 11th Circuit**

HEALTH FREEDOM DEFENSE FUND, ANA DAZA, & SARAH POPE,
Appellees/Plaintiffs

v.

JOSEPH BIDEN, XAVIER BECERRA, CENTERS FOR DISEASE
CONTROL & PREVENTION, DEPARTMENT OF HEALTH &
HUMAN SERVICES, ROCHELLE WALENSKY, MARTIN
CETRON, & UNITED STATES OF AMERICA,
Appellants/Defendants

Appeal from the United States District Court
for the Middle District of Florida
No. 8:21-cv-1693

**BRIEF OF *AMICI CURIAE* 20 DISABLED PASSENGERS
IN SUPPORT OF APPELLEES URGING AFFIRMANCE**

MICHAEL FARIS *et al.*
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I. CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir. R. 26.1, we certify that in addition to the persons and organizations named in the CIP included in the Answer Brief of Appellees, filed Aug. 1, the following have an interest in this case:

1. TRIAL JUDGES

- District Judge Paul Byron, Middle District of Florida
- Magistrate Judge Daniel Irick, Middle District of Florida

2. PEOPLE – *AMICI CURIAE* SUPPORTING APPELLEES

- Michael Faris, lead *amicus curiae* for 20 disabled passengers
- Aaron Abadi, disabled passenger
- Angela Byrd, disabled passenger
- Anthony Eades , disabled passenger
- Avrohom Gordon, disabled passenger
- Charity Anderson, disabled passenger
- Cindy Russo, disabled passenger
- Connie Rarrick, disabled passenger
- Devorah Gordon, disabled passenger
- Jared Rarrick, disabled passenger
- Jennifer Rarrick, disabled passenger
- Kleanthis Andreadakis, disabled passenger
- Leonardo McDonnell, disabled passenger
- Lucas Wall, disabled passenger and appellant/plaintiff in *Wall v. CDC*, No. 22-11532 (11th Cir.)
- Michael Clark, disabled passenger
- Michael Seklecki, disabled passenger
- Peter Menage, disabled passenger
- Shannon Greer Cila, disabled passenger
- Uri Marcus, disabled passenger
- Yvonne Marcus, disabled passenger

- Janviere Carlin, JetBlue Pilot and lead *amicus curiae* for 338 Airline Workers
- Aaron Gastaldo, Southwest Pilot
- Aaron Komara, Xojet Pilot
- Aaron Seiter, JetBlue Pilot
- Aiden Dorsey, PSA Pilot
- Alaina Trocano, American Flight Attendant
- Alexandra Stafford, American Airlines
- Amie Johnson, Southwest Flight Attendant
- Andrea Woolley, SkyWest Flight Attendant
- Andrew Phyfe, Spirit Pilot
- Andy Ix, Southwest Pilot
- Angela Baker, Southwest Flight Attendant
- Angie Kaoni, Southwest Flight Attendant
- Angie May, Southwest Flight Attendant
- Ann Durnwald, Spirit Flight Attendant
- Anthony Korzhov, JetBlue Pilot
- April Rose Mikleton, Southwest Flight Attendant
- Aram Shakarian, JetBlue Pilot
- Barbara Soucy, Spirit Flight Attendant
- Baris Michael Arslan, Spirit Pilot
- Barry Johnson, Frontier Pilot
- Benjamin Oliver, JetBlue Pilot
- Beth Ellis, JetBlue Pilot
- Beverlee Norman, Southwest Flight Attendant
- Beverly Marquart, Southwest Flight Attendant
- Beverse Bringas, Southwest Flight Attendant
- Bobby Maurer, Southwest Flight Attendant
- Bradley Brockman, Southwest Pilot
- Brandon Heard, Spirit Pilot
- Brandy Roland, Southwest Flight Attendant
- Brian Campbell, JetBlue Pilot
- Brooke Miller, Southwest Pilot
- Brett Molzahn, Delta Pilot
- Canan Agaoglu, American Flight Attendant
- Caren Moody, Southwest Flight Attendant

- Carin Powell, Delta Flight Attendant
- Carrie Conkey, Southwest Flight Attendant
- Carson Dodds, JetBlue Pilot
- Casey Turk, JetBlue Pilot
- Cassi Wright, Southwest Flight Attendant
- Cesar Reyes Jr., JetBlue Pilot
- Charles Adams Jr., Spirit Pilot
- Charles Goldman, Southwest Flight Attendant
- Charles Steffens, Southwest Pilot
- Chris DeLong, American Pilot
- Chris Mills, Spirit Pilot
- Christiane Aleman, Southwest Flight Attendant
- Christina Henry, Southwest Flight Attendant
- Christina McDaniel, Southwest Flight Attendant
- Christopher Jobes, Southwest Pilot
- Christopher Lowery, Spirit Pilot
- Christopher Ray West, JetBlue Pilot
- Christopher Simeone, Southwest Pilot
- Christopher Sims, American Pilot
- Christy Pincket, United Flight Attendant
- Cindy Jennings, United Flight Attendant
- Cindy Perkins, Southwest Airlines
- Collier Yarish, JetBlue Pilot
- Corey Hodges, American Flight Attendant
- Corinn Miller, Southwest Flight Attendant
- Courtney Hatton, Southwest Flight Attendant
- Cristina Field, PSA Pilot
- Dana Hoegh-Guldberg, American Pilot
- Dane Rasmussen, JetBlue Pilot
- Daniel Olthoff, Pilot
- Danielle Waltz, SkyWest Flight Attendant
- Dave Mozden, JetBlue Pilot
- David Hasslinger, JetBlue Pilot
- David Reed, Southwest Flight Attendant
- David Torres, JetBlue Pilot
- David Venci, JetBlue Pilot
- Dawn LeClair, Southwest Flight Attendant

- Debbie Baker, American Pilot
- Debra Kovanda, Allegiant Flight Attendant
- Deborah Bau, United Flight Attendant
- Denver Sommers, JetBlue Pilot
- Derek Archer, Delta Pilot
- Derek Osborn, JetBlue Pilot
- Derek Wilkins, JetBlue Pilot
- Diane Hoffer, Southwest Flight Attendant
- Diane Knowles Emira, SkyWest Flight Attendant
- Dianna Shannon, Southwest Flight Attendant
- Diego Chaves, Spirit Pilot
- Dominique Bailey, Southwest Flight Attendant
- Don Whittle, American Pilot
- Donna Montalbano, Southwest Flight Attendant
- Dragos Negrut, Spirit Pilot
- Dusty Dunaj, Spirit Flight Attendant
- Earl Blackshire, Delta Flight Attendant
- Eileen Michaud, Delta Flight Attendant
- Elisabeth Serian, JetBlue Flight Attendant
- Elizabeth Burke, American Flight Attendant
- Elmer Muniz, JetBlue Pilot
- Elysia Cerasuolo, JetBlue Flight Attendant
- Erin McAuliffe-Brown, Southwest Flight Attendant
- Ernie Gameng, Delta Pilot
- Francis Parsons, Alaska Pilot
- Gabriel Rubin, JetBlue Pilot
- Gary Giancola, Delta Pilot
- Gerard William Egel, Southwest Pilot
- Gina Peterson, Southwest Flight Attendant
- Gregory Custer, PSA Pilot
- Gregory Ramola, JetBlue Pilot
- Gregory Stack, JetBlue Pilot
- Hank Landman, Southwest Pilot
- Harmony Martinez, Allegiant Flight Attendant
- Harry Lyman, JetBlue Pilot
- Heather Scaglione, Southwest Dispatch
- Heidi Garrison, Frontier Flight Attendant

- Hernan Orellana, JetBlue Pilot
- Hung Vo, Spirit Pilot
- Ivy Rivera, JetBlue Pilot
- J. Luciene Rathwell, American Pilot
- Jake Gaston, JetBlue Pilot
- James Bruce, Spirit Pilot
- James Hogan, JetBlue Pilot
- James Sullivan, Southwest Pilot (Retired)
- James Varner, JetBlue Pilot
- Jameson Shonk, JetBlue Pilot
- Jana Hill, Southwest Flight Attendant
- Jarod Meehan, Spirit Pilot
- Jason Parks, Southwest Pilot
- Jean-Michel Trousse, JetBlue Pilot
- Jeanene Harris, American Flight Attendant
- Jeannie Howell, Delta Flight Attendant
- Jeff Chandler, Southwest Pilot
- Jeff Devey, Spirit Pilot
- Jeff Johnson, Southwest Pilot
- Jeffery Menna, FedEx Pilot
- Jeffrey Filice, JetBlue Pilot
- Jeffrey Abbadini, Delta Pilot
- Jenann Logan, Southwest Flight Attendant
- Jenni Lantz, Southwest Cargo
- Jennifer Glass Stefaniak, Southwest Flight Attendant
- Jennifer Kean, Alaska Flight Attendant
- Jennifer Shaddock Lewis, Southwest Flight Attendant
- Jeremy Ivanovskis, American Flight Attendant
- Jessica Locke, JetBlue Flight Attendant
- Jessica Sarkisian, Frontier Pilot
- John Allen, Southwest Pilot
- John Reed, Southwest Pilot
- Jolene Williams, Southwest Flight Attendant
- Jon Mermann, American Pilot
- Jon Rising, JetBlue Pilot
- Jonathan Carlson, Spirit Pilot
- Jonathan Russell Biehl, Delta Pilot

- Joni Kolar, Southwest Flight Attendant
- Joseph Callan Jr., Southwest Pilot
- Joseph Cogelia, JetBlue Pilot
- Judith Lear, Director of Marketing & Aircraft Appraisals
- Judith Seibold, Southwest Flight Attendant
- Julia Christiansen, Southwest Flight Attendant
- Julia Edwards, American Flight Attendant
- Julie Kay Jackson, SkyWest Flight Attendant
- Justin Jordan, Spirit Pilot
- Justin Richard, Spirit Pilot
- Karen Malone, Southwest Flight Attendant
- Karen Wright, Spirit Flight Attendant
- Kari Behringer, Southwest Flight Attendant
- Kathleen Goff, American Flight Attendant
- Kathryn Gill, United Flight Attendant
- Kathryn Kugler, Southwest Flight Attendant
- Katrina Johnson, Southwest Flight Attendant
- Katrina Lopez, American Flight Attendant
- Kecia Pettey, American Flight Attendant
- Keith Owens, Spirit Pilot
- Kelli Floyd, Spirit Flight Attendant
- Kellie Meehan, Spirit Pilot
- Kelly Anderson, Southwest Flight Attendant
- Kelly Kidder, Southwest Flight Attendant
- Kelly Wink, Southwest Flight Attendant
- Ken Norman, ABX Air Pilot
- Keri Ann Reardon, SkyWest Flight Attendant
- Kevin Goff, JetBlue Pilot
- Kevin Hall, Delta Pilot
- Kevin Macelhaney, American Pilot
- Kevin Yoder, Delta Pilot
- Kimberly Christian, Southwest Flight Attendant
- Kimberly Dashley, Southwest Flight Attendant
- Kimberly Russek, Southwest Flight Attendant
- Kristen Humbert, Southwest Flight Attendant
- Kristen Salas, Southwest Flight Attendant
- Kristin Vanden Branden, Southwest Flight Attendant

- Krystle Wong, Delta Flight Attendant
- Kurt Schuster, JetBlue Pilot
- Laura Culp, Southwest Flight Attendant
- Laura Sutter, American Flight Attendant
- Lauren Flemmons, Southwest Flight Attendant
- Laurie Harry, Southwest Flight Attendant
- Laurie Parke, Delta Flight Attendant
- Lawrence Young, JetBlue Pilot
- Leah Kitts, Delta Flight Attendant
- Leo Heiss, JetBlue Pilot
- Lisa Williams, American Flight Attendant
- Lorraine Petersen, Allegiant Flight Attendant
- Lotus Bonadona, Southwest Flight Attendant
- Lynn Dicken, Southwest Flight Attendant
- Maggie Eickhoff, Delta Pilot
- Maggie Gelfand, SkyWest Flight Attendant
- Mani Falcone, FedEx Pilot
- Marc Haney, Spirit Pilot
- Mark Blackman, JetBlue Pilot
- Mark Graca, Spirit Pilot
- Mark Maskiell, JetBlue Pilot
- Mark Register, Southwest Pilot
- Marshall Paull, Allegiant Pilot
- Marta Nowak, Delta Flight Attendant
- Martha Peterman, Southwest Flight Attendant
- Marty Moore, Delta Pilot
- Mary Ellen Ferrari, FedEx Pilot
- Mary Ramkowsky, Southwest Flight Attendant
- Matthew Peters, JetBlue Pilot
- Meagan Loomis-Martin, Southwest Flight Attendant
- Melanie DeJean, Southwest Flight Attendant
- Melissa Kellerman, JetBlue Pilot
- Melody Wood, Southwest Flight Attendant
- Menem Hinton, Spirit Flight Attendant
- Meriza Subject, Delta Flight Attendant
- Michael Baldari, JetBlue Pilot
- Michael DiFiore, JetBlue Pilot

- Michael King, American Pilot
- Michael Scott LeBeau, American Pilot
- Michael Shea, FedEx Pilot
- Michaela Fitch, Spirit Flight Attendant
- Michele Jones Aichner, JetBlue Ground Operations
- Michelle Colby, Southwest Flight Attendant
- Monica Gomez, Southwest Pilot
- Nathan Lawrence Price, Southwest Pilot
- Nathan Town, JetBlue Pilot
- Nelly Heist, Delta Flight Attendant
- Nicholas Pittson, SkyWest Flight Attendant
- Nichole Silva, United Flight Attendant
- Nichole Stearnes, Southwest Flight Attendant
- Nicole Stevens, Southwest Flight Attendant
- Nicolette Vajk, Delta Flight Attendant
- Pamela Fandrich, American Flight Attendant
- Pamela Weilbacher, American Flight Attendant
- Pamela Von Schrlitz, Southwest Flight Attendant
- Patricia Burnett, American Flight Attendant
- Patricia Karen Kinch, Southwest Flight Attendant
- Patricia Rossi, Delta Flight Attendant
- Patricia Sedwick, Allegiant Flight Attendant
- Paul Hertzberg, FedEx Pilot
- Paul Nolan, Alaska Pilot
- Paula Conner, Southwest Flight Attendant
- Peggy Sue Flynn, Southwest Flight Attendant
- Peter Birchenough, Southwest Pilot
- Peter Marquart, American Pilot
- Peter Smith, JetBlue Pilot
- Phillip Mack, JetBlue Pilot
- Philip Prada, Southwest Pilot
- Rachel Miller, Southwest Flight Attendant
- Rachel Stanton, Southwest Flight Attendant
- Rachelle Treleven, Delta Flight Attendant
- Rajkumar Seth, Spirit Pilot
- Rebecca Badley, Spirit Pilot
- Richard Garrett IV, Southwest Pilot

- Richard Willis, Spirit Pilot
- Rob McCormick, JetBlue Pilot
- Robert Lynn Attaway, American Pilot
- Robert Iman, Southwest Flight Attendant
- Robert Lopez Jr., Southwest Flight Attendant
- Robin Staveley, JetBlue Pilot
- Roger Hayes, Southwest Pilot
- Ron Klimoff, Spirit Pilot
- Ronald Souther, American Pilot
- Ryan Cairney, JetBlue Pilot
- Ryan Smith, Spirit Pilot
- Ryan Ty Barlow, Southwest Flight Attendant
- Samantha Cazares, Frontier Flight Attendant
- Sandi Lloyd, Southwest Flight Attendant
- Sarah Emily Bliesath, Delta Pilot
- Scott Stricklin, Southwest Pilot
- Scott Ferrando, JetBlue Pilot
- Sean Cooley, Southwest Flight Attendant
- Sean Harris, Southwest Pilot
- Sean Timothy Pearl, Mountain Air Cargo Pilot
- Sharolyn Stanley, United Flight Attendant
- Sharon Remillard, JetBlue Flight Attendant
- Shaun Brown, Spirit Pilot
- Shawn Allen, JetBlue Pilot
- Shawn Marie McKinley, Southwest Flight Attendant
- Shawna Timmons, SkyWest Flight Attendant
- Shawna Ward, American Flight Attendant
- Sheila Casiano, American Flight Attendant
- Sonja Schnabel, Southwest Flight Attendant
- Stacy LaValle, Southwest Flight Attendant
- Stuart Kraner, Delta Pilot
- Stephani Astin Hancock, Southwest Flight Attendant
- Stephen Gehman, JetBlue Pilot
- Stephen La Point, American Pilot
- Stephen Mearriam, Hawaiian Pilot
- Steve Chamberlain, Southwest Pilot
- Steve Lewis, Southwest A&P Mechanic

- Susan Chamberlain, Southwest Flight Attendant
- Susan Connaughton, American Flight Attendant
- Susan Golliehair, Southwest Flight Attendant
- Susan Karr, Delta Flight Attendant
- T. Hunter Ande, Spirit Pilot
- Tammy Gipp, Frontier Flight Attendant
- Tammy Smart, American Pilot
- Tara Jones, Southwest Flight Attendant
- Taylor Woodard, Southwest Flight Attendant
- Ted Richard Miller, Delta Pilot
- Tedd Schaffer, Southwest Flight Attendant
- Terry MacArthur, Delta Flight Attendant
- Theresa Lavin, Delta Flight Attendant
- Theresa Leonardo, Southwest Flight Attendant
- Therese Paul, Delta Pilot
- Terri Ackerman, Southwest Flight Attendant
- Thomas Stevens, Aircraft Maintenance Instructor & Pilot
- Thomas Neil, Southwest Pilot
- Tiffani Harvey, Delta Flight Attendant
- Timothy Propst, Spirit Pilot
- Timothy Holewinski, JetBlue Pilot
- Timothy Maness, JetBlue Pilot
- Tina Thornton, Southwest Flight Attendant
- Todd Brusseau, Frontier Pilot
- Todd Saunders, JetBlue Pilot
- Tom Klingensmith, Delta Pilot
- Tom Oltorik, Pilot
- Tonia Williams, Southwest Flight Attendant
- Traci Hildreth, Southwest Flight Attendant
- Traci Hill, Delta Flight Attendant
- Traci Jo Morrey, Southwest Flight Attendant
- Traci Kay, American Flight Attendant
- Traci Smith, Southwest Flight Attendant
- Tracy Johnston, Southwest Flight Attendant
- Tracy Wilkinson, American Flight Attendant
- Travi Carr, Southwest Flight Attendant
- Travis Kenneth Jarvi, Southwest Pilot

- Trent Babish, Spirit Pilot
- Troy Playman, Southwest Flight Attendant
- Victoria Vasenden, Southwest Flight Attendant
- Vishal Bhatia, Spirit Pilot
- Wendy Mack, Southwest Flight Attendant
- William Dunaske, JetBlue Pilot
- Winston Chapin Wolczak, FedEx Pilot
- Tyson Gabriel, lead *amicus curiae* for 3 Industrial Hygiene Experts
- Stephen Petty, industrial hygiene expert
- Tyson Gabriel, industrial hygiene expert

3. PEOPLE – OTHER

- Every person who uses any form of public transportation anywhere in the United States of America and is subject to the Federal Transportation Mask Mandate
- Every employee in the transportation industry who must enforce the Federal Transportation Mask Mandate
- All employees of the corporations and associations listed below whose salaries and jobs are dependent on their employer's revenue intake, which has been greatly diminished as a result of the Federal Transportation Mask Mandate

4. LARGE CORPORATIONS

- Accor
- Alaska Airlines
- American Airlines
- Atlas Air Worldwide
- BWH Hotel Group
- Caesars Entertainment
- Carnival Corp.
- Choice Hotels International
- Delta Air Lines
- Disney Parks, Experiences, & Products

- Emirates Airline
- Encore
- Enterprise Holdings
- Expedia Group
- FedEx Express
- Hawaiian Airlines
- Herschend Enterprises
- Hilton
- Hyatt Hotels Corp.
- IDEMIA North America
- IHG Hotels & Resorts
- JetBlue Airways
- Marriott International
- MGM Resorts International
- Nikko Hotels International
- Omni Hotels & Resorts
- Southwest Airlines
- United Airlines
- Universal Parks & Resorts
- UPS Airlines
- Venetian Resort Las Vegas
- Wyndham Hotels & Resorts
- All other operators of airplanes and other public-transportation conveyances as well as transport hubs nationwide that must enforce the Federal Transportation Mask Mandate
- All other airlines flying from foreign countries to the United States that must enforce the International Traveler Testing Requirement

5. AIRPORTS

- Chicago Department of Aviation
- Cincinnati/Northern Kentucky International Airport
- Denver International Airport
- Los Angeles World Airports
- Metropolitan Washington Airports Authority
- Miami International Airport
- Philadelphia International Airport

- Port Authority of New York and New Jersey
- Portland International Airport
- San Diego International Airport
- San Francisco International Airport
- Tampa International Airport
- All other airports in the United States that must enforce the Federal Transportation Mask Mandate

6. NATIONAL ASSOCIATIONS

- Airlines for America
- Airports Council International - North America
- American Hotel & Lodging Association
- American Society of Travel Advisors
- Asian American Hotel Owners Association
- Associated Luxury Hotels International
- Consumer Technology Association
- Cruise Lines International Association
- Destinations International
- Exhibitions & Conferences Alliance
- International Air Transport Association
- International Association of Amusement Parks & Attractions
- International Association of Exhibitions & Events
- International Inbound Travel Association
- International Society of Hotel Associations
- Meeting Professionals International
- National Association of Manufacturers
- National Park Hospitality Association
- National Tour Association
- Professional Convention Management Association
- Society of Independent Show Organizers
- Student Youth Travel Association
- Travel Technology Association
- U.S. Chamber of Commerce
- U.S. Tour Operators Association
- U.S. Travel Association

7. OTHER ASSOCIATIONS & SMALL/MEDIUM BUSINESSES

- Atlanta Convention & Visitors Bureau
- Arlington Convention & Visitors Bureau
- Arizona Lodging & Tourism Association
- Associated Equipment Distributors
- ATL Airport District CVB
- Aurora Area Convention & Visitors Bureau
- Best Western Pony Soldier
- Bismarck-Mandan Convention & Visitors Bureau
- Branson Chamber & CVB
- Broadway Inbound
- Butler County Tourism
- Catalina Express
- California Travel Association
- Circle Wisconsin
- CityPASS
- Civitas
- Clark-Floyd Counties Convention & Tourism Bureau
- Commonwealth Hotels
- Connect Travel
- Coraggio Group LLC
- Cortland County Convention & Visitors Bureau
- CRVA/Visit Charlotte
- Destination Analysts
- Destination Augusta GA
- Destination DC
- Destination Door County
- Destination Madison
- Destination Niagara USA
- Destination Panama City (PCCDC)
- Destinations Wisconsin
- Digital Edge
- Discover Destinations LLC
- Discover Flagstaff
- Discover Green Bay
- Discover Puerto Rico

- Evans Hotels
- Experience Florida's Sports Coast
- Experience Kissimmee
- Explore Fairbanks
- Explore St Louis
- Extranomical Tours
- Fargo-Moorhead CVB
- Fenway Park Tours
- Fort Myers – Islands, Beaches & Neighborhoods
- G2 Travel
- Gather Media Network LLC
- Georgia's Rome Office of Tourism
- Georgia Association of Convention & Visitors Bureaus, Inc.
- Glacier Country Tourism
- Global Hospitality Marketing Link
- Go City
- Go Global Travel
- Grand Beach Hotel Group
- Greater Birmingham CVB
- Greater Boston Convention & Visitors Bureau
- Greater Folsom Partnership
- Greater Miami Convention & Visitors Bureau
- Greater Newark Convention & Visitors Bureau
- Greater Raleigh Convention & Visitors Bureau
- Greene County Ohio Convention & Visitors Bureau
- Gulf Shores & Orange Beach Tourism
- Hayward Lakes Visitors & Convention Bureau
- Hilton Head Island/Bluffton Chamber of Commerce
- Historic Tours of America
- Hostelling International USA
- Houston First Corporation
- Huntsville/Madison County Convention & Visitors Bureau
- Irving Convention & Visitors Bureau
- Kelly Tours – Grayline Savannah & Beaufort
- Kentucky Travel Industry Association
- Ketchikan Visitors Bureau

- Lake Tahoe Visitors Authority
- Lakes Region Tourism Association
- Las Vegas Convention and Visitors Authority
- Leading Companies International
- Longwoods International
- Los Angeles Tourism & Convention Board
- Louisiana Travel Association
- Luray Caverns
- Mackinac Island Convention & Visitors Bureau
- Madden Media
- Maine Office of Tourism
- Mall of America
- Manitowoc Area Visitor & Convention Bureau
- Maritz Holdings and Maritz Global Events
- Maryland Tourism Coalition
- Mat-Su CVB
- Mears Transportation
- meetNKY | Northern Kentucky Visitors Bureau
- Miles Partnership
- Miracle Mile Shops, Las Vegas
- Misha Tours
- Mississippi Tourism Association
- Myrtle Beach Area Chamber & CVB
- Naples, Marco Island, & Everglades CVB
- National Park Express
- Natural Bridge Caverns
- New Orleans & Company
- New Smyrna Beach Area Visitors Bureau
- North Dakota Department of Commerce
- NYC & Company
- Oklahoma Travel Industry Association
- Orlando Magic
- OTS Globe
- Paradise Advertising & Marketing
- Port Aransas Tourism Bureau & Chamber of Commerce
- Port of Seattle Tourism Department
- Railbookers Group

- Rancho Cordova Travel & Tourism
- Reno Tahoe
- Resorts World Las Vegas
- Richard Reasons
- RMI Destination Marketing
- Road.Travel
- Rocky Mountain Holiday Tours
- Rocky Mountaineer
- Samantha Brown Media
- San Francisco Travel Association
- San Diego Tourism Authority
- San Diego Zoo Wildlife Alliance
- Santa Monica Travel & Tourism
- Sawgrass Recreation Park
- Searchwide Global
- Shreveport-Bossier Convention & Tourist Bureau
- Sitka Tribe of Alaska
- Ski Utah
- Skyline Sightseeing
- Sojern
- South Carolina PRT
- South Coast Plaza
- South Dakota Department of Tourism
- Southeast Tourism Society
- Springfield Convention & Visitors Bureau
- St. Tammany Parish Tourist & Convention Commission
- Starline Tours of Hollywood
- State of Washington Tourism
- STR
- Sun Islands Hawaii
- Sunny Isles Beach Tourism & Marketing Council
- Texas Travel Alliance
- Tauck
- TBO LLC
- The Guest House at Graceland
- The Happy Valley Adventure Bureau
- Tour America LLC

- Tourism Economics
- TourMappers North America LLC
- Travalco USA
- TravDek
- Travel Butler County
- Travel Marquette
- Travel Portland
- Travel Oregon
- Travel Santa Ana
- Travel South USA
- Tropicana Las Vegas – a DoubleTree by Hilton
- TSA Tours
- U.S. Cultural & Heritage Marketing Council
- Ventura County Lodging Association
- Virginia Tourism Corporation
- Visit Anaheim
- Visit Aurora, CO
- Visit Baltimore
- Visit Cedar City Brian Head
- Visit Colorado Springs
- Visit Dallas
- Visit Denver
- Visit Eau Claire
- Visit Fairfax
- Visit Fort Worth
- Visit Greater Palm Springs
- Visit Harford
- Visit Henderson, NV
- Visit Huntington Beach
- Visit Lake Charles
- Visit Lake County
- Visit Lenawee
- Visit Milwaukee
- Visit Muskogee
- Visit Oakland
- Visit Orlando
- Visit Pensacola

- Visit Phoenix
- Visit Saint Paul
- Visit San Antonio
- Visit Sandy Springs
- Visit Santa Barbara
- Visit Savannah
- Visit St. Pete/Clearwater
- Visit Stockton
- Visit Tampa Bay
- Visit Tri-Valley
- Visit Vacaville
- Visit Vancouver WA
- Visit Williamsburg
- VisitLEX
- Warren County (Ohio) CVB
- Wausau/Central Wisconsin Convention & Visitors Bureau
- West Hollywood Travel & Tourism Board
- West Virginia Department of Tourism
- White Mountains Attractions Association
- www.getyourguide.com
- Yosemite Mariposa County Tourism Bureau
- Young Strategies
- Zartico
- Zimple Rentals

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IV. *AMICI'S* INTEREST IN THE CASE

Friends of the Court are 20 Americans whose disabling medical conditions precluding us from safely wearing a mask resulted in us being blocked from flying or using ground public transportation because of the Federal Transportation Mask Mandate (“FTMM” or “Mask Mandate”) issued by Appellant/Defendant Centers for Disease Control & Prevention (“CDC”) and its parent agency, Appellant Department of Health & Human Services (“HHS”).

We have filed more than 100 disability discrimination complaints with Appellee Department of Transportation (“DOT”) but the department has only investigated seven of them, in violation of the Air Carrier Access Act (“ACAA”), and did not fine any airlines despite founding they broke the law in banning anyone with a medical condition who can’t wear a mask from flying. We speak to the Court on behalf of the millions of disabled passengers who were prohibited from using public transportation in America from February 2021 to April 2022 due to the FTMM – likely the greatest government-driven exclusion of the disabled from public services in this nation’s history.

1. **MICHAEL FARIS** of Elizabethtown, Kentucky, lead *amicus curiae*, is a maintenance supervisor for helicopters based in Laverne, California, that are used in the western part of the United States to suppress wildfires and perform power-line construction. He must travel on commercial airlines

every 12 days for work. He is medically exempt by a neurologist from wearing a mask due to Generalized Anxiety Disorder, but the airlines refused to grant him a mask exception because of the FTMM. American Airlines banned Mr. Faris in October 2021 for simply asking for a medical waiver at check-in. Forced masking on long flights causes Mr. Faris extreme anguish. While muzzled because of the Mask Mandate, he has fainted twice, once aboard a plane (smashing his face into a galley cart) and once in a jetway about to board an aircraft, causing injury to his elbows and knees. He is now enjoying mask-free flying thanks to the *vacatur* of the FTMM and prays this Court affirms that decision and applies it to TSA and DHS as well. Mr. Faris has filed 15 disability discrimination complaints with DOT, which has not investigated any of them.

2. **AARON ABADI** of New York City suffers from Sensory Processing Disorder, which means he can't wear a mask as it creates a sensory overload and can cause major discomfort. His multiple attempts to fly on planes, ride on trains and buses, and use rideshare car services were almost completely unsuccessful since the Mask Mandate took effect Feb. 1, 2021. Mr. Abadi's employment for 30 years has been in waste management, requiring him to travel extensively both domestically and abroad. He became unemployed – and effectively unemployable – due to the Mask Mandate.

Despite his medical records, he has been denied mask exemptions by numerous airlines and filed 50 discrimination complaints with DOT. The agency has not investigated 43 of them. In the seven it did, it found three airlines violated the law but did not fine them. In four other cases, DOT determined the airlines had not failed to comply with the Air Carrier Access Act.

3. **ANGELA BYRD** of Batavia, Ohio, was unable to fly since the Mask Mandate took effect Feb. 1, 2021, because she can't wear a face mask. She objects to forced muzzling because moisture builds up inside a mask, which becomes a hotbed for bacteria and pathogens. Ms. Byrd has battled an anxiety disorder for most of her life. When she covers her nose and mouth, she feels like she can't breathe. This makes her extremely nervous, which produces a sweat response, which moistens the mask and hurts her health. She also suffers from Chronic Obstructive Pulmonary Disorder and has lost a third of her lung capacity. She easily gets short of breath without a mask. When she dons a face covering, she doesn't get good air circulation and is forced to remove the mask to breathe. Ms. Byrd also has tachycardia. Her resting pulse will, at times, be greater than 100 beats per minute. When she gets anxious and feels as if she can't breathe, her pulse goes even higher. She is already nervous when flying. Because of the Mask

Mandate, she would not put herself in a situation where she couldn't breathe freely as it would be dangerous to her health. Like so many millions of other disabled Americans, the Mask Mandate meant Ms. Byrd was excluded from using the nation's aviation and transit systems.

4. **ANTHONY EADES** of Warsaw, Missouri, has medical conditions making it impossible for him to tolerate covering his face. Being shot in 2003 in Iraq while serving in the U.S. military caused some of his disabling conditions. His upper-respiratory distress limits his ability to breathe. Even without an experimental medical device obstructing Mr. Eades' oxygen intake, he has asthma that flares up with no notice. He suffers from Traumatic Brain Injury and Post-Traumatic Stress Disorder, which cause Mr. Eades to suffer severe anxiety and claustrophobia. When something is on his face, his anxiety level kicks into high gear. Mr. Eades was denied the ability to fly by TSA and Southwest Airlines from Phoenix, Arizona, home to Kansas City, Missouri, on March 14, 2021, solely because he can't wear a face covering. He was thrown off a flight before takeoff because he pulled his mask off his face so he could get some breaths. TSA revoked his Pre-Check membership for a year for needing to breathe, and then after Mr. Eades filed suit against the agency in the U.S. Court of Appeals for the

Eighth Circuit, the agency retaliated by banning him from Pre-Check indefinitely. After this horrible harassment, Mr. Eades has yet to fly again. This has caused him to miss spending holidays with his 15-year-old from a prior marriage who lives in another state.

5. **AVROHOM GORDON** of New Richmond, Ohio, was not able to travel because of the FTMM and his inability to wear a mask due to breathing issues that he had surgery for in the past. He has missed a few important events such as a friend's wedding, children's competition celebrations, work conferences, etc. On Jan. 17, 2022, Mr. Gordon was booked on Allegiant Flight 4692 from Cincinnati (CVG) to Los Angeles (LAX). Allegiant denied Mr. Gordon's mask exemption. He was not able to travel because he has a medical disability that does not allow him to wear a mask, and masking would have been harmful to his health. Mr. Gordon was forced to cancel his trip. On Jan. 18, 2022, Mr. Gordon was booked to return home on Frontier Flight 2184 from Ontario (ONT) to Las Vegas (LAS) and then Frontier Flight 2022 from LAS to CVG. Frontier denied Mr. Gordon's mask exemption. He was not able to travel because masking would have been harmful to his health. Mr. Gordon was forced to cancel his trip. Mr. Gordon filed discrimination charges against Allegiant and Frontier with DOT. The department has not investigated his complaints.

6. **CHARITY ANDERSON** of Toledo, Ohio, was illegally restrained, harassed, and denied access to public transportation even though she has a medical exemption from face coverings due to her permanent disabilities. She was forced to endure many obstacles in attempts to get medical exemptions. Many times her requests were denied by transportation providers, which are not licensed to practice medicine and have no capability of evaluating her conditions. The FTMM caused Ms. Anderson undue stress in her professional and personal life by greatly restricting her transportation options.

- a. She was denied access to mass transit twice last year in Memphis, Tennessee.
- b. Prohibited from flying because she can't wear a mask, she was forced to drive to every out-of-state event, resulting in additional costs and wasted time.
- c. If her car were to break down, she would have no means to move around her own city on buses because of the Mask Mandate. Being permanently disabled, Ms. Anderson is unable to ride a bike or walk long distances.
- d. A few months ago, when the FTMM was in effect, Ms. Anderson

booked a flight for a business trip and was bombarded with numerous illegal obstacles and intrusive procedures she had to succumb to just to take an important work trip. Southwest Airlines then denied her medical waiver, with no opportunity to appeal to CDC, TSA, or any other federal agency. The Mask Mandate placed extreme burdens on her, restraining her freedom of movement.

7. **CINDY RUSSO** of Santa Clarita, California, was restricted from traveling due to the FTMM because she suffers from claustrophobia and Post-Traumatic Stress Disorder. She medically can't safely wear a face mask. She has missed important personal as well as work-related events as a result. When her mouth and nose are covered, it is both mentally and physically harmful to Ms. Russo. It reminds her of a traumatic situation wherein she was trapped and couldn't breathe. It is extremely harmful for her to cover her face because it produces massive anxiety. When Ms. Russo is forced by the appellees to cover her face, she feels anxious, trapped, and starts to profusely sweat. Her heart races and her head pounds. Her doctor provided her an exemption from wearing a mask, but no airline would accept it. Ms. Russo flew eight times during the pandemic when the Mask Mandate was in effect and was harassed when she had to

remove her face covering, causing even more anxiety in an already stressful medical situation. She filed charges against American Airlines and United Airlines for disability discrimination. DOT has not investigated either of her complaints.

8. **CONNIE RARRICK** of Saco, Maine, and her husband, Jared, have seven children. Five of them reside in Alabama, Indiana, Iowa, Missouri, and Tennessee. Because her family is so spread out, flying is essential for Mrs. Rarrick and her husband to visit their kids and 20 grandchildren. Being deprived of flying because of their inability to wear a mask was devastating because they lost so many opportunities to visit family.

- a. In 2021, when the FTMM was in effect, two of the Rarricks' daughters were pregnant and expecting in January 2022 (Iowa) and March 2022 (Alabama). Both had some health complications with their pregnancies. Being denied the ability to fly was upsetting and a hardship.
- b. Due to her heart condition, Mrs. Rarrick can't tolerate wearing a face mask. Covering her nose and mouth causes her heart rate to drop, a lack of oxygen, and an increase in carbon dioxide. This all makes her feel like she can't breathe or that she is suffocating.

- c. She was illegally restricted from flying during the COVID-19 pandemic because of her inability to wear a mask. From July 2020 to February 2021, Appellee DOT refused to enforce the Air Carrier Access Act, allowing airlines to completely refuse to transport any disabled passenger who could not don a face covering. After the FTMM took effect, DOT issued a notice to airlines advising them to break the law in eight ways.
- d. The Rarricks were denied the ability to fly by Southwest Airlines from Portland, Maine, to Birmingham, Alabama, solely because they can't wear masks. This trip was to visit their daughter Jacqueline and her family, as well as to attend a family reunion with numerous siblings and other relatives they had not seen in a long time. Mrs. Rarrick had recently been hospitalized and her doctor told her the only safe way for her to travel to Alabama was by air. She had to cancel the trip.
- e. In December 2021, the Rarricks were not allowed to fly to visit their five out-of-state children and 20 grandchildren for Christmas. Instead, they drove about 3,000 miles in a two-week period. This lengthy time on the road caused her major complications due to Mrs. Rarrick's heart issues. She was physically unable to enjoy the

trip.

9. **DEVORAH GORDON** of New Richmond, Ohio has a medical disability that does not allow her to wear a mask. She flew 10 times during the pandemic and experienced harassment, discrimination, bullying, and shaming about masking, causing even more anxiety to an already stressful situation. Her medical waivers were denied by Allegiant Air, American Airlines, and Frontier Airlines.

- a. For example, on her most recent trip, Jan. 17-18, 2022, from Ohio to California and return, Mrs. Gordon was illegally questioned and forced to mask. She also was not allowed to use her own mask but was given one to wear that does nothing to prevent COVID-19 – It even stated on the package “Civil Protection, Not Medical.” Aboard the Allegiant aircraft, multiple threatening announcements were made that according to the “law,” passengers must mask or “be kicked off the plane and/or arrested, fined and/or put in jail.” While eating, an Allegiant flight attendant approached Mrs. Gordon and said “You have been told too many times to put the mask on.” She complied with the orders of the flight crew and fully donned the mask for the rest of the flight, even though she had not yet finished eating and she medically can’t tolerate having her breathing

blocked. The Allegiant flight attendant nevertheless asked for Mrs. Gordon to surrender her ID. When she hesitated because she had not violated any laws, the Allegiant employee threatened to have the police meet her at the arrival gate, where she “would be fined \$10,000.” The captain then announced on the aircraft’s public-address system “There is one passenger who is not complying with the mask rules. We will give her one last chance and hope she will make the right choice, otherwise she will be met at the gate by the police.” When the Allegiant flight arrived at LAX, there were two police officers who met her. Mrs. Gordon agreed to speak with them. They asked her for her ID and warned that if she did not surrender it, the FBI could be called, she could go to jail, and could receive a big fine. (All of which are lies since the FTMM is not a criminal law enacted by Congress). Mrs. Gordon eventually surrendered it, because they would not/could not give her clear information about the process when she asked and she could not think straight with the mask on. The officers gave her ID to Allegiant and then returned it to her. It soon became clear that no laws had been violated, and the airport police could not do anything further.

10. **JARED RARRICK** of Saco, Maine, is the husband of Connie Rarrick.

Due to a brain bleed and age, he can't tolerate wearing a face mask. Covering his nose and mouth causes a lack of oxygen and an increase in carbon dioxide that causes Mr. Rarrick to feel like he can't breathe or that he is suffocating. His problems being denied the ability to fly because of the FTMM are detailed above in his wife's statement.

11. **JENNIFER RARRICK** of Saco, Maine, is the daughter of Connie and Jared Rarrick. Due to her migraines, Ms. Rarrick can't tolerate wearing a face mask. Covering her nose and mouth not only causes a migraine within 15 minutes, but also causes a lack of oxygen and an increase in carbon dioxide that causes her to feel like she can't breathe or is suffocating. She currently lives with her parents. Due to her mother's poor health after their forced 3,000-mile road trip to visit family for the winter holidays, she missed various events due to caring for her mom. When the Rarricks arrived home, her mother was ill from January until May. Mrs. Rarrick is still dealing with complications from not having enough time to rest between driving days. Ms. Rarrick has not been able to work due to caring for her mother.

12. **KLEANTHIS ANDREADAKIS** of Clarksville, Tennessee, is a dual citizen of the United States and Greece. He suffers from a syndrome that makes it intolerable to have anything on his face. JetBlue Airways and

Southwest Airlines refused to sell him tickets because he declared a medical exemption. Although he received a mask waiver from United Airlines, he had to jump through numerous illegal hoops to obtain it due to the FTMM.

13. **LEONARDO McDONNELL** of Aventura, Florida, was banned from riding Space Coast Transit vehicles in Melbourne, Florida, because of his inability to mask due to several medical conditions. He also suffered harassment several times when flying Delta Air Lines without a mask, including one flight where the attendants constantly berated him for not muzzling even though he has a written mask exemption.
14. **LUCAS WALL** of Washington, District of Columbia, and The Villages, Florida, suffers from Generalized Anxiety Disorder, which causes panic attacks and hyperventilation if his breathing is obstructed by a face mask. The Transportation Security Administration (“TSA”) and Southwest Airlines refused to let him board an intrastate flight from Orlando to Fort Lauderdale on June 2, 2021, despite his having completed the paperwork for a medical exemption. Mr. Wall was later denied mask exemptions by numerous airlines despite having a doctor’s note that he should not wear a face covering. He is the appellant/plaintiff in the related FTMM case before this court, *Wall v. CDC*, No. 11-532. He is also the lead petitioner

in six consolidated cases challenging TSA's authority to require masks as part of its mission to ensure transportation security. *Wall v. TSA*, No. 21-1220 (D.C. Cir.) Several other disabled *amici curiae* are also petitioners in that lawsuit.

15. **MICHAEL CLARK** of Toledo, Ohio, fiancé of Charity Anderson, encountered harassment and intimidation as well as was denied access to public transportation due to the Mask Mandate even though he has a mask exemption from his doctor. He does not own a car and in the past used public transportation regularly. The FTMM limited his ability to function on a day-to-day basis. Barred from the Toledo bus system, he was unable to do simple things such as going to the doctor or college in person. The Mask Mandate represents an attack on the disabled, especially working-class citizens such as Mr. Clark who do not have expendable income to travel privately in their own automobiles.
16. **MICHAEL SEKLECKI** of Austin, Texas, (formerly of Lake Mary, Florida), can't wear a mask because of his anxiety disorder. Covering his face makes it uncomfortable for him to breathe. He presents as an *amicus curiae* on behalf of himself and his 5-year-old son, M.S. His son also can't tolerate having his breathing blocked. M.S. struggles with behavioral and developmental delays due to Autism Spectrum Disorder. This disorder

prevents M.S. from being able to wear a face mask or shield. M.S. received for several months in 2021 and 2022 specialized medical treatment at Boston Children's Hospital in Massachusetts for severe gastroenterology disorders that Florida physicians had been unable to diagnose and treat. Mr. Seklecki and M.S. had to fly from Orlando to Boston often for medical care. They were banned by Frontier Airlines solely because M.S. can't wear a mask. Other airlines harassed and demeaned the family. Being denied the right to fly because they can't wear masks nearly jeopardized M.S.' life as it wasn't practical for them to make the lengthy drive to and from Boston every time he had a medical appointment. Mr. Seklecki has filed several DOT complaints, none of which the department has investigated.

17. **PETER MENAGE** of Wasilla, Alaska, lost his job as an equipment operator at the North Slope oilfields along the Arctic Ocean because Alaska Airlines banned him from flying for eating breakfast without a mask on. Alaska is the only airline flying from Anchorage to Deadhorse, where Mr. Menage reported for work on a three weeks on/three weeks off schedule. Due to respiratory issues, Mr. Menage can't tolerate wearing a face mask. Covering his nose and mouth prevents proper breathing including faintness, hyperventilation, anxiety, and more. He obtained a

medical mask exemption from his doctor Dec. 18, 2020. Mr. Menage contacted Alaska Airlines on numerous occasions, including in person at the ticket counter and via e-mail, presenting his medical waiver. On each occasion, he was informed that it would not be accepted. Because he had to fly to maintain his employment, Mr. Menage had to suffer with a mask on during the trips from Anchorage to Deadhorse and back. On one occasion, upon presenting his exemption letter to TSA personnel at the security checkpoint, an Alaska Airlines representative intervened and threatened to ban him from the Deadhorse airport. On another occasion, Alaska's staff forbade Mr. Menage from consuming food or drinks for the duration of the flight even though the FTMM contains exemptions for eating and drinking. He was harassed and threatened with being banned from the airline, a threat Alaska carried out on a subsequent flight when Mr. Menage was not wearing a mask while eating breakfast.

18. **SHANNON GREER CILA** of Louisville, Kentucky, has a qualifying disability that makes it medically harmful for her to wear a mask. She was discriminated against by Southwest, Alaska, Delta, Frontier, and Spirit airlines. Covering her nose and mouth impairs Mrs. Cila's ability to remain calm, breathe, see, smell, taste, hear, keep her face clean, protect

her immune system from accumulated bacteria and other unknown toxins, and to express herself and communicate effectively with others. She suffered numerous travel hassles and deprivations because of the FTMM:

- a. Mrs. Cila's husband, Eric, and her wanted to attend their dear friends' wedding in Houston, Texas. Because airlines were banning the disabled, she had to choose either to not to go or to drive down from Louisville because of her disabilities that prevent her from safely wearing a mask. This was emotionally painful, embarrassing, humiliating, and distressing, amplifying her medical symptoms and causing a serious rift in her marriage. For Mrs. Cila to attend the wedding with her husband, she was forced to travel by herself by car from Louisville to Houston in her personal vehicle, which is old. The car broke down several times on the way there and back. The trip to and from Houston was more than 17 hours each way – a grueling drive for anyone who is not accustomed to motoring often. She suffered many expenses. For example, Mr. Cila accidentally flew home with her car keys. He had to pay more than \$100 to overnight them back to her. It caused a great deal of emotional distress, strain, and hardship because her plans were further delayed to get back home. That never would have happened had she been able to accompany

her spouse on the flights to/from Houston.

- b. After the wedding, Mrs. Cila's paternal uncle died. She was not able to attend his funeral in eastern Texas with the rest of her family because of the FTMM.
- c. Mrs. Cila's disabled, elderly father fell in his home in July 2021 in Trinity, Texas, where he resides in a rural location. He could not get to the Department of Veterans Affairs hospital in Houston, a two-hour drive, on his own. He went without medical care for two weeks before he could be seen. She couldn't go look after him because of the FTMM banning her from flying. This put his life in direct danger because it was a bad fall and he shattered his humerus bone. He suffers from nerve damage from Agent Orange exposure during his military service. He has trouble using his legs and arms. Mrs. Cila feared for his life and wellbeing, yet she could not fly to be there for him because of the Mask Mandate.
- d. Mrs. Cila had to travel by car to New York due to the FTMM. Her nondisabled friends, who were able to fly to the same event in New York, did not have to contend with the road dangers she did. Mrs. Cila had to rent a car for the trip because her vehicle is not reliable.
- e. In September 2021, an employee and friend of her husband's died

in Michigan. Mrs. Cila needed to fly the next day to attend the funeral, but there would not have been time to attempt to jump through all the airlines' arbitrary mask exemption hoops and paperwork because the FTMM unlawfully permitted air carriers to require advance notice (of up to 10 days) before a disabled person needing a mask waiver flies. This illegally denied disabled people the ability nondisabled Americans have to travel last minute when emergencies such as deaths occur. Mrs. Cila could not attend the funeral.

f. Later in September 2021, Mrs. Cila wanted to fly to Chicago to celebrate her birthday with her twin but could not do so because again her medical exemptions were refused by airlines due to the FTMM.

19. **URI MARCUS** is a dual citizen of the United States and Israel. He was subjected to discrimination by several airlines for his inability to wear a mask and was essentially prohibited from flying between his residences in Israel and California because of the FTMM (as well as CDC's International Traveler Testing Requirement, which is not an issue in this case).

20. **YVONNE MARCUS** is the wife of Mr. Marcus. She is also a dual citizen of the United States and Israel and suffers from medical conditions that preclude her from covering her face. Due to the FTMM, she was forced to mask on one ultra-long-haul flight from California to Israel and

then developed skin cancer around the nose, which her doctors attributed to bacteria growth due to masking. She had to have surgery on her nose. After that, she could not travel between Israel and the USA because airlines continued denying her mask exemptions despite her voluminous medical records noting masking caused her cancer.

We submit this brief pursuant to FRAP 29. We consulted with Alisa Klein, counsel for the government appellants, and Brant Hadaway, counsel for the appellees, who both consented to this filing.

No party's counsel authored this brief in whole or part. No party or their counsel contributed money that was intended to fund preparing or submitting the brief. No person other than those signing this brief contributed money that was intended to fund preparing or submitting this document.

V. ARGUMENT SUMMARY

We support Appellees/Plaintiffs Health Freedom Defense Fund, Ana Daza, and Sarah Pope's arguments that the Mask Mandate is *ultra vires* and should remain vacated worldwide pursuant to the lower court's judgment. *Health Freedom Def. Fund v. Biden*, No. 8:21-CV-1693, 2022 WL 1134138 (M.D. Fla. Apr. 18, 2022) ("*HFDF*"). The result of this appeal and the related action *Wall v. CDC*, No. 22-11532, should be a permanent injunction prohibiting the government appellants from ever reissuing a Mask Mandate ever again.

The two named individual appellees/plaintiffs in this case, Ms. Daza and Ms. Pope, suffer from medical conditions that make it intolerable for their oxygen intake to be obstructed. However, the record indicates Ms. Daza and Ms. Pope did not attempt to obtain medical waivers from the airlines under the illegal procedures prescribed by CDC in the FTMM. Nor did they take any flights while the Mask Mandate was in effect and be forced to muzzle themselves as several of us did, including lead *amicus curiae* Michael Faris, who was physically injured twice (one on an plane in flight and once while in the jetbridge of an airport boarding an aircraft) after fainting due to anxiety attacks and oxygen deprivation caused by having to wear a mask. Mr. Faris

must fly for work every 12 days and when airlines continued denying his dozens of mask-exemption requests, he had no choice but to endanger his health by putting a mask on his face because he needed to keep his job in California to support his wife and son in Kentucky. We hope our experiences will clearly illustrate how the FTMM discriminates against the disabled and must never be permitted to come back into effect.

The Mask Mandate caused us incredible harm, all because of our medical conditions that make it unsafe for us to wear a mask. CDC's FTMM Order (and TSA's Health Directives and Emergency Amendment to enforce it) all proclaimed the disabled who can't safely cover their faces are exempt, but then the Department of Transportation put out guidance to the airlines it regulates that they are free to break the law in at least eight ways. CDC and TSA also included numerous provisions in the Mask Mandate that violate the Air Carrier Access Act, which Congress passed in 1986 to protect the disabled from discrimination in the provision of air transportation.

VI. ARGUMENT

A. The Mask Mandate discriminates against the disabled in violation of the Air Carrier Access Act, Americans with Disabilities Act, and Rehabilitation Act.

Thanks to the FTMM, millions of Americans who can't wear face coverings because of medical conditions were essentially banned from using all modes of public transportation nationwide for 14½ months for no rational reason. This grossly violates three federal laws protecting the disabled from discrimination: the ACAA (49 USC § 41705), which applies to airlines; the ADA, which applies to ground transportation providers; and the Rehabilitation Act, which applies to all entities receiving federal financial assistance (which included airlines during the COVID-19 pandemic and most state/local transit authorities). We will focus our argument on the ACAA.

Under CDC's FTMM Order, a person with a disability who can't safely wear a mask is supposed to be exempt. However, the CDC Order goes on to place numerous restrictions on obtaining a mask waiver that violate the ACAA (marked in bold/underline).

“Operators of conveyances or transportation hubs may impose requirements, or conditions for carriage, on persons requesting an exemption from the requirement to wear a mask, including medical consultation by a third party, medical documentation by a licensed medical provider, and/or other information as determined by the operator, as well as require evidence that the person does not have COVID-19 such as a negative result from a SARS-CoV-2 viral test

or documentation of recovery from COVID-19. ... Operators may further require that persons seeking exemption from the requirement to wear a mask request an accommodation in advance.

Here's an excerpt of TSA Health Directive SD 1544-21-02D (issued at CDC's behest) with illegal sections highlighted in bold/underline and corresponding DOT regulations placed in brackets:

“Aircraft operators **may impose requirements, or conditions of carriage, on persons requesting an exemption from the requirement to wear a mask [1], including medical consultation by a third party [2], medical documentation by a licensed medical provider [3], and/or other information as determined by the aircraft operator [4],** as well as **require evidence that the person does not have COVID-19 such as a negative result from a SAR-CoV-2 viral test or documentation of recovery from COVID-19 [5].** ... Aircraft operators may also impose additional protective measures that improve the ability of a person eligible for exemption to maintain social distance (separation from others by 6 feet), such as **scheduling travel at less crowded times or on less crowded conveyances [6], or seating or otherwise situating the individual in a less crowded section of the conveyance [7]** or airport. Aircraft operators may further require that persons seeking exemption from the requirement to wear a mask **request an accommodation in advance [8].**”

Air Carrier Access Act regulations violated:

1. “[Y]ou must not refuse to provide transportation to a passenger with a disability on the basis of his or her disability...” 14 CFR § 382.19(a).
2. Since airlines may not require a medical certificate for a passenger unless he/she has a communicable disease (14 CFR § 382.23(a)), they

may also not require a third-party medical consultation. 14 CFR § 382.23(d).

3. “[Y]ou must not require a passenger with a disability to have a medical certificate as a condition for being provided transportation...” 14 CFR § 382.23(a). “You may ... require a medical certificate for a passenger if he or she **has** a communicable disease or condition that could pose a direct threat to the health or safety of others on the flight.” 14 CFR § 382.23(c)(1) (emphasis added).
4. Airlines are prohibited from requiring that a passenger wear a face covering or refuse him/her transportation unless they determine that the passenger “has” a communicable disease and poses a “direct threat” to other passengers and the flight crew. 14 CFR § 382.21. “In determining whether an individual poses a direct threat, you must make an **individualized assessment**.” 14 CFR § 382.19(c)(1) (emphasis added).
5. No provision of the Air Carrier Access Act or its accompanying regulations permits TSA to allow airlines to require that passengers submit a negative test for any communicable disease. Mandating disabled flyers needing a mask exemption submit a COVID-19 test before checking in but not requiring the same of nondisabled travelers is illegal discrimi-

nation. “[Y]ou must not subject passengers with a disability to restrictions that do not apply to other passengers...” 14 CFR § 382.33(a).

6. “[Y]ou must not limit the number of passengers with a disability who travel on a flight.” 14 CFR § 382.17.

7. “[Y]ou must not exclude any passenger with a disability from any seat or require that a passenger with a disability sit in any particular seat, on the basis of disability...” 14 CFR § 382.87(a).

8. “[Y]ou must not require a passenger with a disability to provide advance notice of the fact that he or she is traveling on a flight.” 14 CFR § 382.25.

CDC’s Mask Mandate violates provisions of federal law enacted by Congress and regulations duly promulgated by DOT that protect the disabled from discrimination. These agencies do not have a license to allow airlines to violate the law. “[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).

With the appellant agencies telling airlines and other transportation providers that they may ignore anti-discrimination laws, most chose to ban the disabled from boarding. Our numerous attempts to gain exemptions proved

futile, just as Navy personnel experienced in seeking waivers from a vaccine mandate.

“The Navy provides a religious accommodation process, but by all accounts, it is theater. ... It merely rubber stamps each denial. ... Religious exemptions to the vaccine requirement are virtually non-existent. ... the record indicates the denial of each request is predetermined. As a result, Plaintiffs need not wait for the Navy to engage in an empty formality. ... The Court finds that exhaustion is futile and will not provide complete relief... In essence, the Plaintiffs’ requests are denied the moment they begin. *U.S. Navy SEALs 1-26 v. Biden*, No. 4:21-cv-1236 (N.D. Tex. Jan. 3, 2022) (enjoining Navy’s vaccine mandate).

Unlike with the Navy’s vaccine dictate, the Mask Mandate doesn’t even provide the disabled any process for seeking a medical waiver from a government agency. CDC and HHS instead give private companies the power to “consider” mask exemptions, virtually all of which are refused, making it a futile gesture to seek a nonexistent exemption.

“The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.” *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

It can’t be disputed that Congress’ intentions are to ensure the disabled, a disadvantaged minority class, are protected from discrimination. Yet DOT put out a Notice of Enforcement Policy advising airlines they may ignore the ACAA.

Information provided to passengers by DOT contradicts the Notice. In a document “New Horizons: Information for the Air Traveler with a Disability,” DOT informs flyers, *inter alia*, that “Airlines may not require passengers with disabilities to provide advance notice of their intent to travel or of their disability...”

“If a person who seeks passage **has** an infection or disease that would be transmittable during the normal course of a flight, and that has been **deemed so** by a federal public health authority knowledgeable about the disease or infection, then the carrier may: ... Impose on the person a condition or requirement not imposed on other passengers (e.g., wearing a mask).” (emphases added).

DOT publishes a 190-page handbook “What Airline Employees, Airline Contractors, & Air Travelers with Disabilities Need to Know About Access to Air Travel for Persons with Disabilities: A Guide to the Air Carrier Access Act (ACAA) and Its Implementing Regulations...” “If, in your estimation, a passenger **with a communicable disease or infection** poses a direct threat to the health or safety of other passengers, you may ... (iii) impose on that passenger a special condition or restriction (e.g., wearing a mask).” *Id.*

But the FTMM unlawfully permitted airlines to require everyone to wear a mask, regardless of whether they had tested positive for COVID-19 or not. Appellees/plaintiffs did not address these anti-discrimination laws in their brief, but we urge the Court to consider them as part of its analysis that the

FTMM is arbitrary and capricious.

B. The Mask Mandate failed to give us constitutionally required due process as CDC and HHS did not allow appeals when airlines and other transport providers refused to honor our medical exemptions.

CDC and HHS gave transportation operators sole authority to determine if a passenger with a medical disability qualified for the exemption. This is not constitutionally permissible. Anyone denied a waiver must have the opportunity to have a speedy pre-deprivation hearing before someone such as a CDC or HHS administrative law judge before they are prohibited from traveling because the Constitution guarantees our right to interstate movement.

“The right to travel, to go from place to place as the means of transportation permit, is a natural right... A restraint imposed by the Government of the United States upon this liberty, therefore, must conform with the provision of the Fifth Amendment that ‘No person shall be ... deprived of ... liberty ... without due process of law’. ... What is involved at the present stage is a question of substantive due process – whether the refusal for the reason given, as alleged in the complaint and undisputed thus far by the Secretary, was arbitrary. If so, it is not a valid foundation for the denial, for the Government may not arbitrarily restrain the liberty of a citizen to travel...” *Shachtman v. Dulles*, 225 F.2d 938, 941 (D.C. Cir. 1955).

“Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any state is a right secured by ... the Constitution. ... The liberty, of which the deprivation without due

process of law is forbidden, ‘means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways...” *Williams v. Fears*, 179 U.S. 270, 274 (1900).

Under the due-process clause of the Fifth Amendment, the government may not revoke a passport or deny renewal without a hearing. *Bauer v. Acheson*, 106 F. Supp. 445, 448 (D.D.C 1952). It follows that likewise, the government may not revoke a disabled passenger’s right to fly or use other modes of public transportation without a hearing.

“[F]reedom to travel ... like other rights, is subject to reasonable regulation and control in the interest of the public welfare. However, the Constitution requires due process and equal protection of the laws in the exercise of that control. ... This court is not willing to subscribe to the view that the executive power includes an absolute discretion which may encroach on the individual's constitutional rights.” *Id.*

As a result of the *Bauer* decision, the State Department hired hearing examiners and created a Board of Passport Appeals. *Aptheker v. Sec’y of State*, 378 U.S. 500, 503 (1964). Here, if CDC and HHS ever are legally allowed to issue another Mask Mandate, the Court must order them to create an office for hearings when the disabled are denied the right to travel (because we can’t wear masks) to review if a medical exemption applies.

“Free movement by the citizen is of course as dangerous to a tyrant as free expression of ideas or the right of assembly and it is therefore controlled in most countries in the interests of

security. ... Freedom of movement, at home and abroad, is important for job and business opportunities – for cultural, political, and social activities – for all the commingling which gregarious man enjoys. ... Freedom of movement is kin to the right of assembly and to the right of association. These rights may not be abridged...” *Aptheker* at 519.

“The right of interstate travel has repeatedly been recognized as a basic constitutional freedom. ... Less drastic means, which do not impinge on the right of interstate travel, are available... other mechanisms to serve that purpose are available which would have a less drastic impact on constitutionally protected interests” such as using the Do Not Board and Lookout databases to block sick passengers from boarding rather than forcing every traveler to obstruct his breathing. *Mem’l Hosp. v. Maricopa Cnty.*, 415 U.S. 250 (1974). CDC and HHS “have not met their heavy burden of justification, or demonstrated that ... in pursuing legitimate objectives, [they have] chosen means which do not unnecessarily impinge on constitutionally protected interests.” *Id.* There’s nothing in the administrative record showing that CDC and HHS even considered using the Do Not Board and Lookout databases rather than impose the FTMM, which makes the Mask Mandate arbitrary, capricious, and an abuse of discretion.

“The right to travel is an ‘unconditional personal right,’ a right whose exercise may not be conditioned. ... [The government] cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with ‘precision,’ ... and must be

‘tailored’ to serve their legitimate objectives. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose ‘less drastic means.’” *Dunn v. Blumstein*, 405 U.S. 330, 341 (1972).

Courts have found that a traveler placed on the government’s terrorist No Fly List must be provided due process. The same applies here to travelers prohibited medical exemptions to the Mask Mandate.

“The List significantly interferes with Mohamed's fundamental right to interstate travel and is therefore subject to strict scrutiny. ... Although the List does not prevent designees from traveling domestically, it limits their practical ability to do so. ... placement on the No Fly List does far more than ‘significantly discourage’ designees from traveling; it often absolutely bars them from so doing and effectively precludes them from engaging in a wide range of constitutionally protected activities.” *Mohamed v. Holder*, 266 F. Supp. 3d 868, 879 (E.D. Va. 2017).

“The Supreme Court has consistently held that the state cannot deprive a person of a liberty ... interest protected by the Due Process Clause of the Fifth ... Amendment without a hearing. ‘As our decisions have emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged.’ ‘[S]ome kind of hearing is required at some time before a person is finally deprived of’ property or liberty interests. ‘A fundamental requirement of due process is ‘the opportunity to be heard.’ It is an opportunity which must be granted at a meaningful time and in a meaningful manner.” *DeNieva v. Reyes*, 966 F.2d 480, 485 (9th Cir. 1992) (internal citations omitted).

“[T]he deprivation by state action of a constitutionally protected interest

in life, liberty, or property is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law. Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property.” *Zinerman v. Burch*, 494 U.S. 113, 125-126 (1990) (cleaned up).

C. The Mask Mandate and lack of appeals process violates our constitutional right to travel.

Another issue the district court did not consider is that the FTMM compels the disabled to choose between protecting our health or exercising our right to travel. Such coercion is constitutionally impermissible. The district also have a statutory right that supplements our constitutional freedom of movement:

“A citizen of the United States has a public **right** of transit through the navigable airspace. To further that right, the Secretary of Transportation shall consult with the Architectural and Transportation Barriers Compliance Board ... before prescribing a regulation or issuing an order or procedure that will have a significant impact on the accessibility of commercial airports or commercial air transportation for handicapped individuals.” 49 USC § 40103 (emphasis added).

Courts are “tasked with upholding the Constitution and redressing fundamental rights because – no matter how dire the crisis – constitutional protections remain commandments, not suggestions. ... just because COVID-19

continues to linger, that is not an invitation to ‘slacken ... enforcement of constitutional liberties.’” *Air Force Officer v. Austin*, No. 5:22-cv-9, 2022 WL 468799 (M.D. Ga. Feb. 15, 2022).

“It is a familiar and basic principle, recently reaffirmed in *NAACP v. Alabama*, 377 U.S. 288, 307 ... that ‘a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.’” *Aptheker* at 500.

Strict scrutiny applies to deprivations of the constitutional right to interstate travel since it is a fundamental right deeply rooted in our nation’s history and traditions. “[T]he ‘constitutional right to travel from one State to another’ is firmly embedded in our jurisprudence. ... the right is so important that it is ‘assertable against private interference as well as governmental action ... a virtually unconditional personal right, guaranteed by the Constitution to us all.’” *Saenz v. Roe*, 526 U.S. 489, 498 (1999). “History and tradition establish the importance of the right to international travel, importance which suggests heightened scrutiny of incursions on that right. Supreme Court precedent bolsters that suggestion.” *Maehr v. Dep’t of State*, 5 F.4th 1100, 1112 (10th Cir. 2021), *cert. denied* 142 S. Ct. 1123 (2022).

“Strict scrutiny is a searching examination, and it is the government that bears the burden” of proof. *Fisher v. University of Texas*, 570 U.S. 297, 310

(2013). Specifically, the government must establish that a mandate is “justified by a compelling governmental interest and ... narrowly tailored to advance that interest.” *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 531-532 (1993). The FTMM fails strict scrutiny because there are far less restrictive options available to advance the federal government’s asserted interest in combatting the spread of COVID-19 such as using Do Not Board and Lookout to stop ill travelers from boarding.

Caps on attendance at houses of worship in New York could not survive strict scrutiny because the State “offered no evidence that applicants ... contributed to the spread of COVID-19,” and there were “many other less restrictive rules that could be adopted to minimize the risk to those attending religious services.” *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63 (2020).

If there are other reasonable ways to achieve an agency’s goal with a lesser burden on constitutionally protected activity, it may not choose the way of greater interference. If it acts at all, it must choose “less drastic means.” *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); see also *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

“[T]he government has the burden to establish that the challenged law satisfies strict scrutiny. ... [N]arrow tailoring requires the government to

show that measures less restrictive of the [constitutionally protected] activity could not address its interest in reducing the spread of COVID.” *Tandon v. Newsom*, 141 S.Ct. 1294 (2021).

CDC has argued in other cases that depriving a person of using airplanes and other modes of mass transit doesn’t interfere with the constitutional right to interstate travel because we could still drive ourselves. But several of us don’t own cars, and those that do suffered through arduous roadtrips that took days instead of a flight that would have taken but a few hours.

“As a practical matter, an affected person is restricted in his ability to visit family and friends located in relatively distant areas of the country or abroad, which through flight can be reached within a matter of hours but would otherwise take days, if not weeks, to access. An inability to travel by air also restricts one’s ability to associate more generally, and effectively limits educational, employment, and professional opportunities. It is difficult to think of many job categories of any substance where an inability to fly would not affect the prospects for employment or advancement; one need only reflect on how an employer would view the desirability of an employee who could not travel by air. An inability to fly likewise affects the possibility of recreational and religious travel, given the time periods usually available to people, particularly those who are employed.” *Mohamed v. Holder*, 995 F. Supp. 2d 520, 528 (E.D. Va. 2014) (internal citations omitted).

D. The Mask Mandate is not authorized by the Public Health Service Act.

Health Freedom Defense Fund’s Answer Brief explores in great detail why the Public Health Service Act (“PHSA”) does not authorize CDC and HHS to

mandate masking. We wish to add a few additional observations and note a recent Supreme Court decision that directly applies here.

Masks are definitely not a “sanitation” measure. Federal law defines a “marine sanitation device” as “any equipment for installation on board a vessel which is designed to receive, retain, treat, or discharge sewage, and any process to treat such sewage.” 33 USC § 1322(a)(5). Similarly, federal railroad regulations define “unsanitary” as “any condition in which any significant amount of filth, trash, or human waste is present in such a manner that a reasonable person would believe that the condition might constitute a health hazard.” 49 CFR § 229.5.

“A court does not simply assume that a rule is permissible because it was purportedly adopted pursuant to an agency’s rulemaking authority.” *New York Stock Exch. v. SEC*, 962 F.3d 541, 546 (D.C. Cir. 2020) (citing *Michigan v. EPA*, 576 U.S. 743 (2015)). So too here. CDC’s general authority in the PHSA “to make and enforce such regulations as in [its] judgment are necessary,” 42 USC § 264(a), “does not afford the agency authority to adopt regulations as it sees fit with respect to all matters covered by the agency’s authorizing statute.” *Id.* at 554.

Like the appellees, we urge this Court to affirm the district court’s reliance on the Major Questions Doctrine. This doctrine “took hold because it refers

to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted.” *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).

Post hoc rationalizations of agency action offered in litigation are insufficient. CDC’s attempt to justify the FTMM as being a “sanitation” measure when the word was never used in the order is nothing more than after-the-event explanation of counsel. *See Clean Wis. v. EPA*, 964 F.3d 1145, 1163, 1167 (D.C. Cir. 2020) (holding EPA designations unlawful because “we cannot accept ... counsel’s *post hoc* rationalizations for agency action”).

“The Department’s interpretation goes too far. The first sentence of § 264(a) is the starting point in assessing the scope of the Secretary’s delegated authority. But it is not the ending point. While it is true that Congress granted the Secretary broad authority to protect the public health, it also prescribed clear means by which the Secretary could achieve that purpose. ... An overly expansive reading of the statute that extends a nearly unlimited grant of legislative power to the Secretary would raise serious constitutional concerns, as other courts have found. ... Congress did not express a clear intent to grant the Secretary such sweeping authority.” *Alabama Ass’n of Realtors v. HHS*, No. 20-cv-3377 (D.D.C. May 5, 2021) (vacating CDC’s Eviction Moratorium).

The statutory context implies a narrow grant of authority to the CDC to issue public-health measures related or incident to quarantine. Section 361 appears under Part G of the PHSA, titled “Quarantine and Inspection.” Judge

Mizelle properly concluded that 42 USC § 264(a) applies only to property, not human beings. We urge the Court to affirm that conclusion, which has been made by every court who has reviewed CDC orders during COVID-19 based on this statutory provision. The PHSA clearly does not authorize masking as a “sanitation” measure. And although Congress has legislated many times in response to coronavirus, it never passed a Mask Mandate. Several bills were filed, but none cleared committee. And the Senate voted 57-40 to terminate the FTMM. S.J.Res. 37.

“[T]he Agency's discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself. ... Given these circumstances, there is every reason to ‘hesitate before concluding that Congress’ meant to confer on EPA the authority it claims.” *West Virginia* at 2610.

“As Chief Justice Marshall put it, this means that ‘important subjects ... must be entirely regulated by the legislature itself,’ even if Congress may leave the Executive ‘to act under such general provisions to fill up the details.’ ... the Constitution's rule vesting federal legislative power in Congress is ‘vital to the integrity and maintenance of the system of government ordained by the Constitution.’ ... It is vital because the framers believed that a republic – a thing of the people – would be more likely to enact just laws than a regime administered by a ruling class of largely unaccountable ‘ministers.’” *Id.* at 2616 (Gorsuch & Alito, JJ., concurring).

To avoid constitutional problems such as the Nondelegation Doctrine,

the Court should reject CDC's interpretation of § 264(a) as unreasonable. *P.J.E.S. v. Wolf*, No. 1:20-cv-2245, 2020 WL 5793305 at *14 (D.D.C. Sept. 25, 2020) (rejecting the government's "breathhtakingly broad" interpretation of 42 USC § 265, because "it would raise serious constitutional issues").

"The powers that Congress afforded the Agency Defendants within the statute above do not include, or imply, the power to impose vaccine and/or mask mandates. ... the Head Start Mandate is a decision of vast economic and political significance. ... Like the CDC, the statute upon which Agency Defendants base their authority has never been used to impose a mandatory specific medical treatment... If the Executive branch is allowed to usurp the power of the Legislative branch to make laws, then this country is no longer a democracy – it is a monarchy. This two-year pandemic has fatigued the entire country. However, this is not an excuse to forego the separation of powers. If the walls of separation fall, the system of checks and balances created by the founders of this country will be destroyed." *Louisiana v. Becerra*, No. 3:21-cv-4370 (W.D. La. Jan. 1, 2022) (enjoining HHS' mask-and-vaccine mandate for Head Start).

CDC "literally has no power to act ... unless and until Congress confers power upon it," *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986), because the CDC's "power to regulate in the public interest must always be grounded in a valid grant of authority from Congress." *Brown & Williamson* at 161.

E. The Mask Mandate is not authorized by CDC's regulations, making it arbitrary and capricious.

An order is arbitrary and capricious if it fails to "comply with [the

agency's] own regulations,” *Nat’l Env’t Dev. Ass’n Clean Air Project v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014). As addressed above in Section E, CDC ignored its own regulations in promulgating the FTMM, one of many problems with the mandate.

During December 2021 and January 2022, as the first mild Omicron sub-variant spread across the United States, masks did nothing to stop it. This was evidenced by the tens of thousands of flights that were canceled during the winter holidays because airline crews – who are forced to mask due to the FTMM – became infected in enormous numbers.

“It is incumbent on the courts to ensure decisions are made according to the rule of law, not hysteria ... One hopes that this great principle – essential to any free society, including ours – will not itself become yet another casualty of COVID-19.” *Dept. of Health & Human Services v. Manke*, No. 20-4700-CZ (Mich. 2020) (Viviano, J., concurring).

CDC cited several regulations in attempt to justify the legality of the FTMM, which notably is an order, not a duly promulgated regulation. When “the measures taken by health authorities of any State ... are insufficient to prevent the spread of any of the communicable diseases ... [the CDC director] may take such measures to prevent such spread of the diseases ... including ... sanitation ... of animals or articles believed to be sources of infection.” 42

CFR § 70.2. But CDC’s director never determined which states had “insufficient” public-health measures, instead issuing a blanket statement that any state that doesn’t require masks is deficient, despite there being no scientific evidence to support masking, as our friends the 3 Industrial Hygiene Experts note in the *amicus curiae* brief.

42 CFR § 71.31(b) likewise provides no authority for the FTMM. This provision states the CDC director “may require detention of a carrier until the completion of the measures outlined in this part that are necessary to prevent the introduction or spread of a communicable disease.” This applies *after* a plane or ship arrives in the United States from abroad. It does not authorize masking during the international trip nor on any domestic flight.

The government also points to 42 CFR § 71.32(b), which allows CDC’s director, when she “has reason to believe that any ***arriving carrier or article or thing*** on board the carrier is or may be infected or contaminated with a communicable disease, he/she may require detention, disinfection, disinfestation, fumigation, or other related measures...” (emphasis added). A human being is not a transportation “carrier” nor an “article or thing.” And the regulation only applies to an *arriving* transportation carrier from a foreign country. No authorization for masking can be found here.

The title of this subpart confirms our contentions: “42 CFR Subpart D –

Health Measures at U.S. Ports: Communicable Diseases.” The regulations apply only upon arrival at ***U.S. ports of entry***, not to in-transit masking. Finally, the other three regs cited (42 CFR §§ 70.3, 70.6, and 70.12) only apply to “A person who has a communicable disease,” not every single person traveling on any form of public transportation.

“[I]f CDC promulgates regulations the director finds ‘necessary to prevent’ the interstate or international transmission of a disease, the enforcement measures must resemble or remain akin to ‘inspection, fumigation, disinfection, sanitation, pest extermination, destruction of infected animals or articles.’ ... never has CDC implemented measures as extensive, disabling, and exclusive as those under review in this action. However, in this action CDC claims a startlingly magnified power. ... CDC’s assertion of a formidable and unprecedented authority warrants a healthy dose of skepticism. ... Both text and history confirm that the conditional sailing order exceeds the authority granted to CDC by Section 264(a). And if Section 264 fails to confer the statutory authority for the conditional sailing order, the regulations implementing Section 264 can grant no additional authority.” *Florida v. Becerra*, 544 F. Supp. 3d 1241 (M.D. Fla. 2021) (enjoining CDC’s pandemic restrictions for cruiseships).

Congress never authorized a Mask Mandate. Even if it did, it’s quite possible Congress lacks authority to enact one, let alone an executive agency.

“[T]he Commerce Clause does not empower Congress ‘to regulate individuals precisely because they are doing nothing.’ ... it suggests that a broad mandate (e.g., one that generally requires individuals to wear masks) may be particularly susceptible to challenge because such a mandate could be construed as compelling individuals who are ‘doing nothing’ to engage in an activity – mask wearing – that is not even a commercial activity,” according to Congressional Research Service.

Even if FTMM does not exceed Congress' authority under the Commerce Clause, it at a minimum fails the statute's interstate requirement because more than 90% of public-transportation trips every day are intrastate. See *United States v. Lopez*, 514 U.S. 549 (1995) (discussing a lack of congressional findings regarding the effect on interstate commerce).

None of the statutes or regulations the government cites authorize CDC to make or enforce regulations that amount to a blanket preventative measure against people who *might* be carrying an infectious disease. Such a broad reading of the statute would be "tantamount to creating a general federal police power." *Skyworks v. CDC*, 524 F. Supp. 3rd 745, 758 (N.D. Ohio March 10, 2021). The Constitution does not provide the federal government with such a power. *Bond v. United States*, 572 U.S. 844 (2014).

CDC cried wolf in arguing below that *vacatur* of the FTMM would cause devastating setbacks in the nation's battle against COVID-19. If CDC's catastrophic fearmongering were true, where in its May 31, 2022, opening brief does it offer the Court facts that the striking down of the Mask Mandate has led to any increase in COVID-19 cases, hospitalizations, or deaths among travelers and transport workers? That brief contains not a shred of argument or evidence that the sudden termination of the FTMM has created any harm. This proves the argument made by Health Freedom Defense Fund that the

FTMM did nothing to reduce COVID-19 transmission in the transit sector; all it caused was chaos in the sky with passengers fighting back against forced muzzling and the prohibition of many disabled from traveling.

The fact CDC offered none in its brief is clear and conclusive evidence that forced masking does not change the number of infections. The policy was arbitrary and capricious from the beginning. Judge Mizelle's finding that it was unreasonable rulemaking must be affirmed.

F. The Mask Mandate runs afoul of the 10th Amendment.

Regulation of public health and intrastate transportation is historically the province of the states, all 50 of which do not require people to cover their nose and mouth. Under the 10th Amendment, the states determine public-health mandates and policies concerning intrastate transportation, not unelected bureaucrats at CDC and HHS. As noted above, Congress has *never* enacted a federal mask mandate and it's doubtful it would have the power to do so – certainly not one as broad as the FTMM that required masking if a person rode a city bus or subway one mile to visit friend, an activity wholly disconnected from interstate commerce. Should this Court make the mistake of reversing Judge Mizelle's *vacatur* of the FTMM, CDC should only be allowed to reapply it to interstate transportation.

Any suggestion that the CDC Director Walensky has the same authority as the states to combat the economic and health challenges posed by COVID-19 is misguided. “Our Constitution principally entrusts ‘[t]he safety and the health of the people’ to the politically accountable officials of the States ‘to guard and protect.’” *S. Bay Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring).

“The Commerce Clause power may be expansive, but it does not grant Congress the power to regulate noneconomic inactivity traditionally within the States’ police power. *See Sebelius*, 567 U.S. at 554 (Roberts, C.J., concurring) (‘People, for reasons of their own, often fail to do things that would be good for them or good for society. Those failures – joined with the similar failures of others – can readily have a substantial effect on interstate commerce. Under the Government’s logic, that authorizes Congress to use its commerce power to compel citizens to act as the Government would have them act.’); *see also Bond v. United States*, 572 U.S. 844, 854 (2014) (‘The States have broad authority to enact legislation for the public good – what we have often called a ‘police power.’ . . . The Federal Government, by contrast, has no such authority...’ (citations omitted)). Indeed, the courts ‘always have rejected readings of the Commerce Clause ... that would permit Congress to exercise a police power.’ *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring). In sum, the Mandate would far exceed current constitutional authority.” *BST Holdings*.

22 states are suing to strike down the Mask Mandate. *Van Duyne v. CDC*, No. 4:22-cv-122 (N.D. Tex.); *Florida v. Walensky*, No. 8:22-cv-718 (M.D.

Fla.).¹ As 21 of them argued, the FTMM

“harms Plaintiffs’ sovereign interests. Many Plaintiffs have laws or policies prohibiting or discouraging mask requirements in contexts where the mask mandate applies. ... the mask mandate harms the Plaintiffs’ quasi-sovereign interests in the health, safety, and welfare of their citizens. Forced masking ... causes a variety of negative health consequences, including psychological harms, reduced oxygenation, reduced sanitation, and delayed speech development.” Complaint, *Florida v. Walensky*.

G. The Mask Mandate violates America’s commitments under international law.

The protection of the rights of the disabled is of international concern. “[I]n accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights...” International Covenant on Civil & Political Rights (“IC-CPR”), 999 U.N.T.S. (adopted by the U.S. on Sept. 8, 1992).

By banning the disabled who can’t don masks from flying, CDC and HHS violate our rights under international law to liberty of movement, freedom to leave any country, and ability to enter our own country.

¹ Proceedings in both of these cases have been stayed pending this Court’s decisions in this lawsuit and *Wall*.

We also want to draw the Court’s attention to the Convention on International Civil Aviation (“CICA”),² which the United States ratified Aug. 9, 1946. Pursuant to CICA Art. 37, the International Civil Aviation Organization (“ICAO”) has adopted, *inter alia*, Annex 9, which contains provisions on facilitation of air transport, including the transport of passengers requiring special assistance. The 15th Edition of CICA Annex 9 became applicable Feb. 23, 2018. Annex 9 to CICA is binding in this country as part of the treaty. In carrying out all federal aviation laws, the Executive Branch “shall act consistently with obligations of the United States Government under an international agreement.” 49 USC § 40105 (b)(1)(A).

“Contracting States shall take the necessary steps to ensure that persons with disabilities have equivalent access to air services.” CICA Annex 9 § 8.34. “[P]ersons with disabilities should be permitted to travel ***without the requirement for a medical clearance***. Aircraft operators should only be permitted to require persons with disabilities to obtain a medical clearance in cases of a medical condition where it is not clear that they are fit to travel and could compromise their safety or well-being...” CICA Annex 9 § 8.39 (emphasis added).

² This treaty is also known as the “Chicago Convention”

But the Mask Mandate, in violation of CICA and 14 CFR § 382.23(a), allows airlines to require a medical clearance/certificate to request a mask exemption.

VII. CONCLUSION

This Court should not allow the government appellants to reinstitute policies that exclude the disabled from flying and using all other forms of public transportation nationwide because we happen to have medical conditions that don't allow us to obstruct our breathing. Since Judge Mizelle vacated the FTMM 3½ months ago, we have been able to resume traveling again – as have likely millions of other disabled Americans who were barred from traveling during the COVID-19 pandemic due to an *ultra vires* policy with no scientific rationale that demonstrably did nothing to slow the spread of coronavirus in the transportation sector.

Private companies such as airlines, taxis, rideshare cars, and ferries should never be given *carte blanche* power by the federal government to deny medical exemptions signed by our doctors. They are not medical providers and do not possess a medical license to overturn decisions made by actual doctors.

We join Health Freedom Defense Fund, Ms. Daza, and Ms. Pope in urging that the decision of the district court should be affirmed.

VIII. SIGNATURES

Respectfully submitted this 3rd day of August 2022.

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IX. CERTIFICATE OF COMPLIANCE

We certify that this brief complies with FRAP 29(a)(5) & 32(a)(5)(A) because it has been prepared in 14-point Georgia, a proportionally spaced font, and this document complies with the 6,500-word limit because the Argument contains 6,455 words as measured by Microsoft Word.

X. CERTIFICATE OF SERVICE

I certify that on Aug. 3, 2022, I e-mailed this brief to these Court personnel for uploading into the 11th Circuit's Case Management/Electronic Case Filing system:

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I also certify that I am mailing an original and four paper copies to the Court as required.

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